

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL S. GETHINS
Claimant

VS.

CEDAR LIVING CENTER
Respondent

AND

TRAVELERS INSURANCE COMPANY
Insurance Carrier

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Docket No. 250,491

ORDER

Claimant appealed the March 27, 2002 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 15, 2002.

APPEARANCES

James R. Roth of Wichita, Kansas, appeared for claimant. William L. Townsley of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that she injured her neck and back on or about October 10, 1999, while lifting a nursing home resident. Claimant also alleges that she sustained additional injury through her last day of working for respondent on approximately October 30, 1999.

In the March 27, 2002 Award, Judge Moore denied claimant's request for workers compensation benefits. The Judge found claimant's accident occurred on approximately October 10, 1999, but that she had failed to provide respondent with timely notice of the accidental injury. In addition, the Judge determined the evidence failed to establish that claimant sustained any additional injury after October 10, 1999.

Claimant contends Judge Moore erred. Claimant argues she aggravated her back between October 10 and October 30, 1999, when she first notified respondent with notice of the accidental injury. In the alternative, claimant argues that just cause exists to extend the period for providing timely notice from 10 days to 75 days. Accordingly, claimant requests the Board to reverse the Award entered by the Judge and to order the payment of temporary total disability benefits, medical benefits and a work disability (a disability greater than the functional impairment rating).

Conversely, respondent and its insurance carrier contend the Award denying benefits should be affirmed. They argue that if claimant's accident occurred on October 10, 1999, she failed to provide respondent with notice of the accidental injury within 10 days. They also argue claimant did not have just cause to delay providing respondent with notice of the accidental injury and, consequently, the notice period should not be extended beyond 10 days. Finally, they argue that any permanent partial general disability should be based upon claimant's whole body functional impairment rating, which they contend is two percent.

The issues before the Board on this appeal are:

1. What is the date of claimant's accident? Moreover, did claimant sustain additional injury between October 10, 1999, and her last day of working for respondent on approximately October 30, 1999?
2. Did claimant have just cause to extend the period for notifying respondent of the October 10, 1999 accident from 10 days to 75 days?
3. What is the nature and extent of claimant's injury and disability?
4. Is claimant entitled to receive temporary total disability benefits and medical benefits?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. The claimant, Carol S. Gethins, worked for Cedar Living Center, a nursing home facility, as a certified nurses aide for 11 years. On approximately October 10, 1999, Ms. Gethins experienced back pain when she lifted a male resident while putting him to bed. At the regular hearing, Ms. Gethins testified that she was alone when the lifting incident occurred.

2. According to Ms. Gethins' regular hearing testimony, her back began feeling better as she continued to work in the days following the lifting incident. Because her back symptoms were resolving and she was able to perform her regular work duties, Ms. Gethins did not believe she had any serious problem. Consequently, Ms. Gethins did not immediately report the October 10, 1999 lifting incident to any of her supervisors.

3. Also according to the regular hearing testimony, Ms. Gethins' back symptoms began worsening around October 23, 1999, and on October 30, 1999, her back gave out and she experienced difficulty standing. After Ms. Gethins' back gave out, the head nurse sent Ms. Gethins home. October 30, 1999, was the last day that Ms. Gethins worked for Cedar Living Center.

4. Ms. Gethins' testimony that her symptoms resolved following the October 10, 1999 incident but then worsened around October 23, 1999, was corroborated by testimony from her husband, John Gethins. According to Mr. Gethins, his wife's back quit hurting three or four days after the initial October 1999 lifting incident but her symptoms returned approximately two weeks later and progressively worsened until her last day of work. Mr. Gethins testified once his wife's symptoms began to worsen he told her to report the accident to the nursing home. Nevertheless, before his wife's symptoms began to worsen, Mr. Gethins did not believe his wife's condition was serious because she had experienced similar symptoms two or three times per year in the past and those symptoms would resolve after only three or four days.

5. Cedar Living Center first learned of Ms. Gethins' October 1999 back injury on October 30, 1999, when Ms. Gethins' back gave out at work. A report, which was given to the director of nursing Margaret Wilson, indicated Ms. Gethins had hurt her back lifting a resident, Bartis Brown. The report also indicated Ms. Gethins could not remember when the lifting incident occurred, although it may have occurred a week or so before.

6. On November 1, 1999, Ms. Gethins saw her family physician, Dr. Richard May. According to Dr. May's office notes, which were entered into evidence by the parties' agreement, Ms. Gethins advised the doctor that she felt her back go out approximately a month before while lifting people at work. The doctor's November 1, 1999 office note reads, in part:

S: Pt is seen for evaluation of pain in her back. **She felt it go out approximately a month ago while lifting people at work.** She in general c/o however of generalized arthralgias [*sic*], myalgias [*sic*] and aching in her shoulders, elbows, wrists, hands, ankles and feet. She c/o essentially symmetrical leg pain. She has a previous hx of disc herniation at L5-S1 and surgical repair of this. (Emphasis ours.)

Dr. May recommended an MRI scan of Ms. Gethins' low back and referred her to a neurologist, Dr. Ashok Narayan, for a second opinion.

7. On November 10, 1999, Ms. Gethins and her husband went to Cedar Living Center to complete an accident report. Ms. Gethins could not remember the date of the lifting incident with Mr. Brown but at that time she believed she was working with a coworker named Mary Lou. After looking at a work schedule to see when Mary Lou worked, Ms. Gethins and her husband chose October 23, 1999, as the accident date.

8. On November 12, 1999, Ms. Gethins spoke with a representative from the insurance carrier. In that conversation, Ms. Gethins stated she was unsure when she injured her back but she believed it occurred two or three weeks before while she was lifting Mr. Brown. Ms. Gethins also stated that her symptoms had progressively worsened to the point that it eventually laid her out on the floor. The transcript from that November 12, 1999 telephone conversation reads, in part:

Q. (Ms. Vosberg) Can you tell me ah what happened and when the accident happened

A. (Claimant) Okay, ah I was trying to go back in my head when it happened, I think it happened about ah two or three weeks ago, I'll say three, okay, to make it safe, because my memory is atrocious, but I would never be a horrible witness _____, ah but it had to be about 3 weeks ago and it was about 12 o'clock at night and ah my aide and I was, that worked with me, we was going in, going around and checking people to see if they was in, _____, and ah I went in, ah this, do I have to say who the person is I _____

Q. Yes

A. Okay Artis [*sic*] Brown and I went, we went to get him up and the other aide put, you know took ahold [*sic*] of his arm and I went around to the back and was to push him up and something, I felt something pop in my back, this is at 12 o'clock

. . . .

Q. Did you have an immediate onset of pain

A. No I didn't have an immediate, I felt it you know when you can feel it pop and then it just progressively got worse, it's just like ah through the night it just started kind of giving me problems and then it kind of let up you know, I'd come home crippling and, and hobbling in and then it kind of let up and I was okay the next night and then it, you know it would ah, I'd sleep and rest and then it would ah, I would kind of progressively get worse you know, and then ah about a week ago I went in

and man it just like laid me out on the floor. It just started going spasms all up and down my back and I couldn't walk, I just went to the floor and I couldn't catch my breath and it was bad

9. On November 17, 1999, Ms. Gethins saw Dr. Narayan. The history that Ms. Gethins gave the neurologist was somewhat different than the history she gave to Dr. May. According to Dr. Narayan's examination notes, Ms. Gethins told him she had experienced occasional back pain until approximately three months before when she began experiencing persistent pain from her neck to her lower back. But she also told the doctor that her problems were aggravated a month before after lifting people at work. In his November 17, 1999 examination notes, Dr. Narayan wrote, in part:

This 49-year-old lady has had problems with her back since 1993. She underwent right L5-S1 microdisectomy by Dr. Salumbides in Kearney. **She was doing fairly alright with occasional back pain which was not severe and did not last for any length of time, until 3 months ago, since when she has had persistent pain in her entire back from the nape of her neck down to her lower back.** Sometimes she develops a sudden catch in her neck or lower back and cannot move for a few seconds. The pain does not radiate into her arms or legs, but patient has noticed for the past month that she has had tingling and numbness of her hands and feet. . . .

Patient's problems got aggravated a month ago after she helped lifting [sic] people at work. (Emphasis ours.)

Dr. Narayan suspected Ms. Gethins' problems were musculoskeletal in nature and that she possibly had fibromyalgia. The doctor recommended various blood tests, but the doctor did not recommend an MRI as he did not feel that it would benefit her at that time.

10. On December 9, 1999, Ms. Gethins saw a chiropractor, Dr. Douglas Fair, for back treatment. In the history provided to Dr. Fair, Ms. Gethins wrote that she had injured her back at work and that her symptoms began on October 23. The record is not entirely clear, but it appears that Ms. Gethins has not received any treatment for her back after receiving a short course of chiropractic treatment from Dr. Fair, nor has she received the various diagnostic tests recommended by the various doctors that she has seen.

11. The Judge selected Dr. Lee R. Dorey, an orthopedic surgeon, to examine Ms. Gethins. The doctor saw Ms. Gethins in April 2000 and took a history that she felt a snap in her low back while she was pulling on residents on October 9 or 10, 1999. Ms. Gethins also advised the doctor that she continued working until October 31, 1999, when she developed severe back pain while lifting another resident. Dr. Dorey diagnosed lumbar disc disease and a probable recurrent herniation at L5-S1, cervical spine disc disease at

multiple levels and probable osteoporosis. The doctor recommended an MRI and, if the MRI scan was not definitive, a lumbar myelogram and lumbar CT scan.

12. Dr. Dorey provided his opinion whether Ms. Gethins sustained additional injury following the October 9 or 10, 1999 lifting incident. The doctor believes Ms. Gethins experienced a bulging disc as a result of the early October 1999 lifting incident and that the disc herniated on her last day of work, which was October 30, 1999. Dr. Dorey agrees it is quite plausible Ms. Gethins' lumbar disc actually herniated on October 30, 1999, from lifting people at work that day.

Q. (Mr. Roth) Let me get down really to the heart of the entire deposition quite frankly, because the diagnosis and much of the history is very similar from every doctor that has seen her. Your report says I do not believe her working between the 10th and the 30th of October would make any difference in her clinical presentation. And now that I've sat through this definition -- deposition, I think that I understand maybe that the phrase "in her clinical presentation" is more of an art form than I realized. Would it be fair to say -- I mean I see that sentence there, **but I also think that you said it's quite plausible that the actual herniation could have taken place on the 30th and could have been caused by the lifting of people during that day?**

A. (Dr. Dorey) **That is correct.**¹ (Emphasis ours.)

On the other hand, in Dr. Dorey's April 3, 2000 report to Judge Moore, the doctor wrote, in part:

In regards to causation, on a more probable than not basis, she has re-herniated her L5-S1 disc by "pulling residents" on the 9th or 10th of October. It is not uncommon to suffer "reherniation" after previous lumbar discectomy. I believe this is at L5-S1 because of her clear description of pain to the little toe. She clearly has nerve irritation because of the increased lower back pain and leg pain with neck vein compression. The pain up and down her spine is due to intense nerve irritation she experiences from the L5-S1 disc.

I do not believe her working between the 10th and 30th of October would make any difference in her clinical presentation.

13. Dr. Dorey did not examine Ms. Gethins for providing a functional impairment rating. Additionally, the doctor did not believe Ms. Gethins was at maximum medical recovery when he saw her in April 2000. Although the doctor felt uncomfortable assigning a

¹ Dorey Depo. at 53-54.

functional impairment rating without obtaining additional tests, the doctor testified Ms. Gethins probably had a 10 percent whole body functional impairment for the injury to the lumbar spine under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA Guides), with five to eight percent preexisting due to the 1993 disc surgery. The doctor, however, also testified that Ms. Gethins' functional impairment rating might be higher if loss of range of motion and decreased sensation were considered. The doctor did not attempt to rate the impairment to Ms. Gethins' cervical spine, although he did attribute Ms. Gethins' neck symptoms to the injury at work. The doctor testified, in part:

Q. (Mr. Roth) Okay. Let me see if I understand it. I think you're saying you'll agree that her [cervical] pain may have started because of the work-related injury; however, that pain was caused not by any spinal problem but because of the nerve -- central nervous system?

A. (Dr. Dorey) Correct.

Q. Okay. And had there not been the injury at work, chances are at least at that period of time pain wouldn't have commenced in the cervical spine?

A. Probably not.²

14. At her attorney's request, in October 2000 Ms. Gethins saw Dr. Pedro Murati for an evaluation. Dr. Murati diagnosed a reherniated L5-S1 disc and a cervical strain, which he rated under the AMA Guides (4th ed.) at 25 percent to the whole person. The doctor did not rate Ms. Gethins' preexisting functional impairment. Moreover, Dr. Murati believed Ms. Gethins sustained a second trauma and permanent injury during her final days of working for Cedar Living Center.

15. Dr. Murati reviewed a list of former work tasks prepared by human resources consultant Jerry D. Hardin. Eliminating duplicate tasks, Ms. Gethins performed a total of 11 work tasks in the 15-year period before the October 1999 incidents with her back. Dr. Murati identified six of the 11 tasks that Ms. Gethins should no longer perform due to her work-related injuries. Dr. Dorey agreed.

16. By way of medical history, Ms. Gethins injured her back at Cedar Living Center in 1993. On that occasion, Ms. Gethins herniated the L5-S1 intervertebral disc and in August 1993 underwent surgery. But the 1993 injury did not keep Ms. Gethins from working. After recovering from surgery, Ms. Gethins resumed her regular duties as a certified nurses aide and worked without medical restrictions or limitations. According to Ms. Gethins'

² Dorey Depo. at 40-41.

preliminary hearing testimony, during the period between her 1993 back surgery and the October 10, 1999 lifting incident, her back would hurt but it did not keep her from working, although she worked in pain on a lot of days. But at the regular hearing, Ms. Gethins testified she did not have any back problems following the 1993 surgery.

17. In approximately May 2000, Ms. Gethins and her husband moved from Oberlin, Kansas, to Wichita, Kansas, for what they perceived were better employment opportunities. At that time, Ms. Gethins did not feel she could work because of her back injury and her husband was unemployed. Ms. Gethins was not receiving medical treatment as the couple did not have any health insurance and they otherwise lacked the funds for medical treatment.

18. After moving to Wichita, Ms. Gethins found a job at a grocery store working in its delicatessen. But that job lasted for only one day as Ms. Gethins lifted a bucket of chicken and experienced back pain. The store sent Ms. Gethins home and terminated her. That was in May 2000. In September 2001, three days before the regular hearing, Ms. Gethins found another job, which was washing pots and pans at a school. That job also lasted only one day due to her back problems.

19. At the September 2001 regular hearing, Ms. Gethins testified she had looked for work at either an answering service or telemarketing company, at a hospital for a clerical position, at two nursing homes to do crafts with the elderly, at two hospitals, at a child care facility to watch children, at several grocery stores to sack groceries, and at the postal service to sort mail. Additionally, Ms. Gethins inquired of an unspecified number of individuals regarding in-home care.

20. At the regular hearing, Ms. Gethins also testified she checked the newspaper want ads daily and made two or three job applications per week since moving to Wichita. But that testimony is contradicted by her husband, who approximately two weeks later testified he did not know the last date that his wife looked for work as she had not looked for work a great deal because she really was not able to work due to her back condition. Mr. Gethins testified, in part:

Q. (Mr. Townsley) When was the last time she [claimant] filled out an application, do you know?

A. (Mr. Gethins) No, I don't.

Q. Do you know when the last time she would have spoken with an employer about work --

A. I don't know when that would be.

MR. TOWNSLEY: Okay. That's all the questions I have.

A. I believe she hasn't looked for work a great deal since the last job she did, because that hurt her considerably, and she's not really been able to.³

CONCLUSIONS OF LAW

The Board concludes the March 27, 2002 Award should be reversed to award Ms. Gethins workers compensation benefits for a neck and back injury that she sustained while working for Cedar Living Center through October 30, 1999.

The Board finds and concludes that Ms. Gethins experienced back symptoms in early October 1999 while lifting Mr. Brown. After that incident, Ms. Gethins' symptoms resolved until approximately October 23, 1999. Between October 23 and October 30, 1999, Ms. Gethins' symptoms worsened until she could no longer work. The Board concludes Ms. Gethins sustained a series of traumas and additional injury at work through October 30, 1999, while performing her regular job duties as a certified nurses aide. In reaching that conclusion, the Board not only considered Ms. Gethins' testimony but also considered Dr. Murati's opinions, as well as Dr. Dorey's opinion that it was quite plausible Ms. Gethins' lumbar disc herniated on October 30, 1999, after lifting residents of the nursing home.

Cedar Living Center had knowledge of Ms. Gethins' accidental injury on October 30, 1999, when the head nurse sent Ms. Gethins home after her back had given out. The Board concludes Ms. Gethins sustained injury to her back through the last day of work on October 30, 1999, and, consequently, Cedar Living Center had timely notice of the accidental injury.⁴

Based upon the medical information provided, the Board concludes Ms. Gethins now has a 25 percent whole body functional impairment, which includes eight percent that preexisted the injuries in this claim.

Ms. Gethins has sustained an "unscheduled" injury and, accordingly, her permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

³ Gethins Depo. at 26.

⁴ See K.S.A. 44-520 (Furse 1993).

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁵ and *Copeland*.⁶ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from his or her injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁷

When considering Ms. Gethins' wage loss, the Board concludes that she has not made a good faith effort to find appropriate employment. That conclusion is based upon the testimony of Mr. Gethins, who testified that his wife had not been looking for work. Ms. Gethins' testimony to the contrary is discounted as she admits she has a terrible memory and several times provided testimony that directly contradicted her earlier testimony. In short, Ms. Gethins is a terrible historian.

Consequently, for Ms. Gethins' post-injury wage the Board imputes the federal minimum wage of \$5.15 per hour, or \$206 per week. Comparing Ms. Gethins' pre-injury wage of \$325.51 to the imputed post-injury wage of \$206 creates a 37 percent wage loss for purposes of the permanent partial general disability formula.

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁷ *Id.* at 320.

The testimonies from Dr. Murati and Dr. Dorey establish that Ms. Gethins has lost the ability to perform six of 11 former work tasks for a 55 percent task loss.

Averaging the 37 percent wage loss with the 55 percent task loss creates a 46 percent permanent partial general disability. As required by the Act, the permanent partial general disability is reduced by the eight percent preexisting functional impairment, consequently reducing Ms. Gethins' permanent partial general disability award to 38 percent.⁸

Ms. Gethins is entitled to receive temporary total disability benefits from October 30, 1999, through April 3, 2000, which is the date that she saw Dr. Dorey. As the doctor indicated, Ms. Gethins had not reached maximum medical recovery at the time that he examined her. The Board concludes Ms. Gethins was unable to work and was temporarily and totally disabled at least through April 3, 2000. But the record fails to establish how long after that date Ms. Gethins remained unable to work. Accordingly, Ms. Gethins' temporary total disability benefits are limited to that period ending April 3, 2000.

Finally, Ms. Gethins is entitled to receive medical treatment for her neck and back injuries. Accordingly, Cedar Living Center and its insurance carrier are required to pay or reimburse all medical expenses incurred by Ms. Gethins for medical treatment of her neck or back following October 30, 1999. In addition, Cedar Living Center and its insurance carrier are required to provide Ms. Gethins with ongoing medical treatment, which is reasonable and necessary and which is directly related to her October 1999 injuries. Ms. Gethins is also entitled to receive unauthorized medical benefits up to the statutory maximum.

AWARD

WHEREFORE, the Board reverses the March 27, 2002 Award and awards Ms. Gethins benefits for an injury that occurred at work through October 30, 1999.

Carol S. Gethins is granted compensation from Cedar Living Center and its insurance carrier for an October 30, 1999 accident and resulting disability. Based upon an average weekly wage of \$325.51, Ms. Gethins is entitled to receive 22.29 weeks of temporary total disability benefits at \$217.02 per week, or \$4,837.38, plus 154.93 weeks of permanent partial disability benefits at \$217.02 per week, or \$33,622.91, for a 38 percent permanent partial general disability and a total award of \$38,460.29.

⁸ See K.S.A. 1999 Supp. 44-501(c).

As of December 20, 2002, Ms. Gethins is entitled to receive 22.29 weeks of temporary total disability compensation at \$217.02 per week in the sum of \$4,837.38, plus 141.57 weeks of permanent partial general disability compensation at \$217.02 per week in the sum of \$30,723.52, for a total due and owing of \$35,560.90, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$2,899.39 shall be paid at \$217.02 per week until paid or until further order of the Director.

Claimant is awarded medical benefits as set forth above in the Conclusions of Law.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation